THE TRAVANCORE CONTRACT BILL.

MR. PUTHUPALLI S. KRISHNA PILLAI : I beg to present the report of the Select Committee on the Travancore Contract Bill, and to move that the Bill as reported by the Select Committee be taken up, for consideration.

MR. C. V. CHANDRASEKHARAN : I second it.

The motion was put and carried.

Clauses 1 and 2.

The question that clauses 1 and 2 do stand part of the Bill was put to vote and carried.

The clauses were added to the Bill.

Clause 3

MR. R. SIVARAMAN NAIR : Sir, I beg to move the following amendment:—

In Clause 3 substitute "and" for the last "or".

Under the clause, the communication of proposals the acceptance of proposals and the revocation of both i. e. proposals and acceptance can be done by any act or omission of the party, proposing accepting or revoking, by which he intends to communicate such proposal, but which may not have that effect or by any act or omission which has that effect but not the intention.

It would appear from a reading of the section that acceptance of proposals can be done by any act by which the party intends to communicate such acceptance but which has not that effect. It is not necessary that the act must have the legal effect. The other party need not even know, that the act of the party was intended to create that effect.

A offers to B a house for sale for Rs. 500. B scratches his head and goes away. Under the Clause B's scraching his head is sufficient communication of acceptance if he can prove that by scratching his head he intended to communicate his acceptance of A's offer. A might have thought that he scratched his head simply because he wanted to scratch his head. He might not have known that B's scratching his head was intended to communicate to him that he was accepting the offer. Now can it be said that the communication of the acceptance is legally effective Now under the clauses, it would appear that B's scratching his head is sufficient to communicate the proposal.

Coming to the 2nd part, communication of acceptance can be done by an act which has that effect but which act was not intended to communicate such acceptance etc. Here there is the effect but not the intention. A offers to sell a house to B ;, Before revocation of the offer B overhears a conversation between A and C inconsistant with the offer i. e. B hearing a conversation between A and C which

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was not intended for his ears. Now can it be said that this over hearing of the conversation is sufficient communication of the revocation of the offer. This cannot be because here there is no intention to communicate the intention to revoke the offer.

In both these cases the communication is inchoate and under the clauses both these inchoate communications will be valid and legal communications. Such inchoate communication will have no legal effect only because of the subsequent section.

It will be both simple and more rational to say that a communication to be effective must have both the intention and the effect and this can only be achieved by changing 'or' into 'and'. Hence the amendment.

MR. PUTHUPALLY S. KRISHNA PILLAI: I oppose the amendment. This amendment, I presume, is intended to convey the idea that the act intended for communication as well as the actual effect of communication should be present in order to amount to actual communication under the law. The question is whether the revocation of proposal or acceptance should be deemed to have been made by any act or omission by which the party intends to communicate his proposal or revocation. The provision in the bill runs thus:-

> "The communication of proposals, the acceptance of proposals and the revocation of proposals, and acceptance, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal, acceptance or revocation *or which have the effect of communicating it.*"

In regard to the expression "or" occurring in the clause, I may say that this clause 3 is the same as Section 3 of the British Indian Contract Act. As regards that expression, the commentators have said that it would seem both simpler and more rational to say that an act intended to communicate but failed to say so is not a communication at all. They also say that it will be more rational to use the expression "and" for the word "or". As the expression stands at present, the commentators have only said that it is good so far as it goes. All that they say is, a more rational meaning could be given to it by the alteration of the expression "or" into "and". But they have not followed it up.

In enacting commercial laws, one principle which I have stated already is to have uniformity in laws with that obtaining in other countries. In this particular respect I am unwilling to say that we shall be justified in departing from the principle underlying this section. It is not a mere verbal change that is sought for, but a change in principle. The commentators have not accepted that. The British Indian Legislatures too have not changed the expression "or" into "and" though the commentators have said that a more rational meaning could

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be given to it by such a substitution, Moreover, we have been following the principles of laws contained in various sections of the Indian contract Act. Under these circumstances, I oppose the amendment because it seeks to make a fundamental change in the principle already accepted and acted upon. It is not a mere verbal alteration that is now urged by the member.

PRESIDENT: I may say that members of the House would be well advised if they accept the law as laid down in the Indian Contract Act of 1872. It has been commented upon and cases have been decided on it. I know there were differences of opinion in that connection. Supposing a man had intended to give an answer but had kept it locked in his drawer and his servant has released it somehow, in such a case, would the master be bound by it? Such aspects have been dealt with in a series of decisions. It is not desirable to change words here or there, and depart from the law obtaining in British India. It will be safer to proceed on the basis of the enactment in force there, which has stood the test of time.

MR. R. SIVARAMAN NAIR: I beg to withdraw my amendment.

The question that clause 3 stand part of the Bill was then put and carried. The clause was added to the Bill.

Clauses 4 to 15.

The question that clauses 4 to 15 stand part of the Bill was next put and carried. The clauses were added to the Bill.

Clause 16.

MR. JOSEPH VITHAYATHIL: Sir, I move that sub-clause 4 may be deleted. This sub-clause was proposed by the Select Committee. Although it relates to a question of procedure burden of proof is a matter of vital importance in practical application of the law. In the Indian Contract Act there is an explanation to section 16 which says that nothing in that section should be deemed to affect the provisions of section 111 of the Indian evidence Act. That explanation is incorporated as sub-clause 4 of clause 16 of this Bill. My point is that it is not proper to do so. It is true, we have not got an evidence Act here, and therefore it is not possible to make a reference to section 111 as it is done in the Indian Contract Act. Section 111 of the evidence Act applies generally to all cases of transactions between parties one of whom stands to the other in a position of active confidence. Such cases may arise in respect of a criminal charge, tort or contract. The good faith of a transaction may be a defence in a criminal prosecution relating to offences like criminal misappropriation, criminal breach of trust, etc., brought against an agent by the principal. Similarly the good faith of a transaction may be a matter in dispute in an action in tort between parties one of whom occupies a position of active confidence towards the other. Thus section 111 of the evidence Act refers to a matter of

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general application and is not limited to cases of contract. If we incorporate that explanation in section 16 of the Indian Contract Act as a sub-clause to clause 16 of our Bill, what will be the effect? Clause 16 relates to undue influence. Before we consider clause 16 we have to see what clause 14 says. It lays down the conditions under which a consent will be deemed to be free. It should not be caused by any one of the five conditions mentioned in that clause. They are: (1) Coersion as defined in section 15, (2) Undue influence as defined in section 16, (3) Fraud as defined in section 17, (4) Misrepresentation as defined in section 18 and (5) Mistake subject to the provisions of sections 21, 22, and 23. So, necessarily section 16 must relate to the definition of undue influence. But sub-clause (4) does not necessarily relate to the question of undue influence. As I said before, it relates generally to transactions between parties one of whom stands to the other in a position of active confidence and in which the question of good faith of the transaction arises for consideration. Therefore from the point of view of mere form, it will not be proper to incorporate that provision of general application in the Indian Evidence Act into this clause of the Contract Act. Every thing contained in section 16 must relate to the definition of undue influence, or else section 16 will not be in conformity with section 14. It has also to be borne in mind that bad faith in itself is not a circumstance that will invalidate a consent. It cannot affect the validity of a contract which is otherwise valid in law. Of course bad faith may be one of the elements that constitute 'fraud', undue influence, 'coercion', or 'misrepresentation.' But that does not mean that 'bad faith' is the same as 'undue influence.'

Now we shall consider how far sub-clause 4 agrees with sub-clause 3. Sub-clause 3 reads thus:

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall be upon the person in a position to dominate the will of the other.

It has to be noted that according to clause 16 a person who is in a position to dominate the will of another is the same as one occupying a position of active confidence towards that other.

PRESIDENT: It need not be so. Your confidential clerk is not necessarily in a position to dominate your will at your expense; yet he is a person occupying a position of active confidence.

MR. JOSEPH VITHAYATHIL: For that matter it is necessary to consider sub-clauses 1 and 2 of clause 16. They are: 16. (1) A contract is said to be induced by "undue influence" where the relations

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subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. (2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another.

(*a*) when he holds a real or apparent authority over the other, or when he stands in a fiduciary relation to the other ; or

(*b*) when he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress.

So, according to sub-clause (2) (*a*) in all cases where one person stands in a fiduciary relation to another he will be deemed to be in a position to dominate the will of that other in regard to the transaction in respect of which he stands in a fiduciary relation. My clerk will be deemed to be a person capable of dominating my will in respect of a transaction with which he is entrusted by me. He is my agent so far as that transaction is concerned. In the case of transactions performed by an agent on behalf of a principal, although the former may be a servant of the latter, for the purpose of definition of undue influence the agent will be deemed to be a person in a position to dominate the will of the principal. He may also be described as a person standing to the principal in a position of active confidence. Thus it is seen that a person who is holding a position of active confidence and who therefore comes under sub-clause (4) must necessarily be a person that comes under sub-clause (2) (*a*) also. In other words sub-clause (2) (*a*) and sub-clause (4) relate to the same category of persons *i. e.*, persons who hold a fiduciary relation and who therefore occupy a position of active confidence. If these two sub-clauses relate to the same category of persons and if sub-clause (4) refers to the question of undue influence, which is sought to be defined by clause 16, we find that there is a real conflict between sub-clauses (3) and (4). For under sub-clause (3) in order that the presumption should arise certain conditions have to be satisfied.

MR. KOTTALIL P. ABRAHAM: Does a conflict arise?

MR. JOSEPH VITHAYATHIL: It does. Sub-clause (3) lays down certain conditions and until they are satisfied the presumption would not arise. Whereas, under sub-clause (4) these conditions need not be satisfied.

Under sub-clause (3), for the presumption to arise the transaction must, appear either on the face of it or on the evidence adduced, to be unconscionable. The sub-clause is clear on the point. The Privy

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Council also has held so in the case of *Ragunath Prasad* v. *Surja Prasad*. But sub-clause (4) does not lay down any such condition and under that sub-clause there is an initial burden to prove the good faith of the transaction. This difference between the two sub-clauses will be of vital importance in practical application. Section 111 of the Indian Evidence Act is based on a well-known English rule of equity If we want to adopt that principle in its entirity the better thing will be to amend sub-clause (3) itself by taking away the conditions laid down in that sub-clause rather than create a conflict between two sub clauses in the same clause. It may also be noted that even the English rule is not an invariable one. It has been held that it does not apply to a case of gift by a wife to the husband, although it cannot be denied that the husband is a person who stands to the wife in a position of active confidence. It has also been held that the rule may not apply to cases of family settlement under which a child may give up his right to certain properties in favour of the parents. In such cases it will be for the child to prove that the family settlement was brought about by undue influence. I mention these cases only to show that the rule is not an absolutely invariable one. At the same time it cannot be denied that it is a well-recognised rule of English law, and I am not in any way questioning the soundness of that rule. The point is whether it would be proper to incorporate that rule in clause 16 in the manner in which it is done and thereby create an uncertainty with regard to the interpretation of that clause. The fact that we have not got an Evidence Act will not be sufficient justification for embodying two mutually conflicting sub-clauses in the same clause. If we are not satisfied with sub-clause (3) let us amend it. In any case sub-clauses (3) and (4) cannot go together, and sub-clause (4) has not got a proper place in clause 16. I am therefore for deleting that sub-clause.

MR. PUTHUPALLI S. KRISHNA PILLAI: I oppose the amendment. Sub clause 4 of clause 16 is really section under 111 of the Indian Evidence Act. No other alteration is made. This new clause has been added for the simple reason that there is no Evidence Act in this State. It is found that section 16 of the Indian Contract Act was the result of a subsequent legislation for the purpose of curing a defect which existed in the original Act. Sub-clause (3) deals with a rule of evidence. Sub clause (4) is more comprehensive. Sub-clause (3) deals with cases of undue influence where one person is in a position to dominate the will of another and it appears that the transaction on the face of it is unconscionable. Clause 3 covers only such cases. Sub-clause 4 reads as follows :—" Notwithstanding anything contained in sub-clause 3 between the parties one of whom is in a position of active confidence." I suppose it is very clear that there is a difference between a person standing in the position of active confidence and the person standing in fiduciary relationship.

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MR. JOSEPH VITHAYATHIL: Is there any difference between active confidence and those standing in a fiduciary relationship with the other?

MR. PUTHUPALLI S. KRISHNA PILLAI: Yes, there is. As a matter of fact, the provision contained in Section 111 of the Indian Act is intended to provide a general rule applicable to all cases where one person stands in a position of active confidence. But sub clause 3 provides for cases where one person is able to dominate the will of the another.

Without sub clause (4) it may appear that sub clause (3) curtails the scope of section 111 of the Indian Act. Sir Smith V Key referred, to at page 98 of Pollock and Mullas Indian Contract Act.

MR. N. RAMAKRISHNA PILLAI: Is good faith essential to be defined in all cases of undue influence?

MR. PUTHUPALLI S. KRISHNA PILLAI: That need not be.

PRESIDENT: I hope honourable members will allow me to deal with the subject as a lawyer for the time being. The law relating to presumptions in the case of contracts entered into by persons occupying position of fiduciary relationship is dealt with by Leake, one of the recognised authoritiss on the Law of Contract. Leake says:—

> "The principle applies in all cases of persons dealing with others to whom they stand in a recognised fiduciary relation, as trustees with beneficiaries, solicitors with clients, parents with children, guardians with wards, and the like; in which cases the presumption of undue influence arises in law, and it lies upon such a person to prove that he took no advantage of his position or influence."

The fact is that so far as the British Indian Enactments are concerned, Section 16, sub sections 1 to 3, appear in the Contract Act and sub-clause 4 as it appears in the bill appears in the Evidence Act. But it has been made clear that one does not restrict the scope of the other. The position that is sought to be taken in this enactment is this: Under Section 16 sub-sections 1 to 3 a certain contract is either induced by undue influence or not. If it is induced by undue influence, then certain consequences follow. Sub-clause 4 is, as honourable members will realise, couched as a proviso. As is recopied in the law relating to the construction of documents or statements, a proviso is sometimes an exception and sometimes is tantamount to an independent enactment. Really speaking sub-clause 4 is an independent enactment bringing into force section 111 of the Indian Act. It is a supplement to sub-sections 1, 2 and 3, and it is something more *i. e.*, a definite extension. If the honourable member succeeds in removing sub-clause 4, the result will be very unfortunate, because there is no Evidence Act in Travancore; and the impression may be created that the doctrine of undue influence is limited

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to the four corners of sub-clauses 1 to 3, and our courts will be put to great difficulties. Perhaps the honourable member himself may agree with courts that the doctrine of active confidence is not incorporated in this Act, that the Evidence Act does not apply and that therefore the doctrine has not been accepted by this Legislature. In defining undue influence it will be better that we adopt all the principles which govern that doctrine elsewhere. It will be safer to do so.

Clause 16 was put and carried.

Clause 16 was added to the Bill.

Clauses 17 to 26.

Clauses 17 to 26 were put and carried. Clauses 17 to 21 were added to the Bill.

Clause 27.

MR. R. SIVARAMAN NAIR: Sir, I do not move the motion in the printed list. I have got another. I will move that. The motion is to add as proviso to clause 27.

> "Provided that an agreement by a person before or after his marriage, with his wife not to marry again is valid".

The clause as it now stands is very wide and quite unguarded. ..... Every agreemeet in restraint of the marriage of any person is void, whatever be the restraint. The word restraint is not qualified. Restraint may be partial or it may be absolute. Under the clause restraint of any kind will be void.

Under English law it appears that partial restraint is not void. It appears that in England, a contract not to marry a particular person or any one of a certain definite class will be held good. If that be the law in England, is there any reason why the law should be different in England ?

The section is based on public policy and public policy alone. Let us see whether there is anything in public policy to have such absolute restraint.

Under the Mohammedan law a man have at the same time four wives. If he wants yet to marry another, all what he has to do is to tell her that he is divorcing here and then wait for another short period and marry again. If he wants to marry one more, divorce one more, and then he can marry the sixth. This he can do till the hundredth or even more.

PRESIDENT: The Mohommedan law has provided for a crude system of dowries.

MR. R. SIVARAMAN NAIR: Yes Sir. The question is whether there is anying against public policy in the proviso; Some consider the case of a Mohammedan who has married ninty nine girls, wants to marry the 100th. Is there anything against public policy, if the 100th victim

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of this unscrupulous man, asks him to enter into a contract with her not to marry again while she is living. In this connection it must also be remembered that it is not obligatory for a Mohammedan to have at least four wives at a time. If that was obligatory surely the provisions of the proviso would have been against public policy. Since polygamy is not compulsory under Mohammedan law, I see nothing contrary to public policy in having partial restraint.

PRESIDENT: Are you really satisfying your object in this amendment? Now the contract is enforced by damages or at the worst by imprisonment in the case of default of those damages. A agrees not to marry again, he marries; what happens then?

MR. R. SIVARAMAN NAIR: All I want is that such contract must be made valid. Under the general words of the section it would appear that they will not be valid.

PRESIDENT: One person may ask for damages for breach of contract. You have not provided for the penalty for marriage. It is a substantive convention provision. The honourable member will have to answer all these.

MR. R. SIVARAMAN NAIR: The proviso says that such contract will be valid. Under the clause as it stands such contracts will not be. So under the existing clause a girl cannot even enter into such a contract and no court will enforce such contracts. If it is first held that such contract are valid then, it will be time enough to think of the consequences of its breach. If the girl can get only damages, that will do and it will be sufficient restraint so far as he is concerned. I was at the question of public policy. To me it appears, Sir, that there is nothing against public policy in declaring valid a contract which imposes a partial restraint of marriage.

PRESIDENT: In England under the common law of the land, monogamy is the rule whereas under the personal law of the Mohammedans and Hindus monogamy is not a part of the personal law of the persons.

MR. PUTHUPALLY S. KRISHNA PILLAI: I oppose the amendment. As a matter of fact, such a provision is necessary for the purpose of maintaining the principle enunciated in clause 27.

The mover now wants this additional provision to be made. This proviso is not necessary for the purpose of the Contract Act.

MR. R. SIVARAMAN NAIR: Sir, I do not press the amendment.

The amendment was, by leave of the House, withdrawn.

The question whether clause 27 stands part of the Bill was put and carried.

Clause 27 was added to the Bill;

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Clauses 28 to 46.

The question whether clauses 28 to 46 form part of the Bill was put and carried.

Clauses 28 to 46 were added to the Bill.

Clauses 47 to 62.

MR. R. SIVARAMAN NAIR: Sir, I do not move the amendment under this clause.

The question whether clauses 47 to 62 stand part of the Bill was put and carried.

Clauses 47 to 62 were added to the Bill.

Clauses 63 to 123.

MR. R. SIVARAMAN NAIR: Sir, I do not move the amendments up to the seventh one.

The question whether clauses 63 to 123 stand part of the Bill was put and carried.

Clauses 63 to 123 were added to the Bill.

Clause 124.

MR. JOSEPH VITHAYATHIL: Sir, in clause 124, I beg to move that the words "policy holders" may be substituted by the words "policy brokers". It is printer's mistake and it ought to be corrected.

MR. KOTTALIL P. ABRAHAM: I second it.

MR. PUTHUPALLI S. KRISHNA PILLAI: In printing, this mistake has appeared. I accept that amendment.

The question whether clause 124, as amended, stands part of the Bill was put and carried.

Clause 124 was added to the Bill.

Clauses 125 to 185.

The question whether clauses 125 to 185 stand part of the Bill, was put and carried.

Clauses 125 to 185 were added to the Bill.

Clauses 186 to 193.

MR. R. SIVARAMAN NAIR: I do not move the amendment.

The question whether clauses 186 to 193 stand part of the Bill was put and carried.

Clauses 186 to 193 were added to the Bill.

PREAMBLE AND TITLE.

MR. PUTHUPALLI S. KRISHNA PILLAI: I move that the preamble and title do stand part of the Bill.

The question whether the preamble and title stand part of the Bill was put and carried.

The preamble and title were added to the Bill.

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THIRD READING OF THE TRAVANCORE CONTRACT BILL.

MR. PUTHUPALLI S. KRISHNA PILLAI: Sir, I beg to move that the Bill be passed.

MR. C. V. CHANDRASEKHARAN: I second it.

The question whether the Bill be passed was put and carried.

The Bill was passed.

THE TRAVANCORE SALE OF GOODS BILL.

MR. PUTHUPALLI S. KRISHNA PILLAI: Sir, I rise to present the report of the Select Committee on the Sale of Goods Bill and move that the Bill as revised be taken into consideration.

MR. C. V. CHANDRASEKHARAN: I second it.

PRESIDENT: There are no amendments. The question before the House is whether clauses 1 to 65 stand part of the Bill.

The question was put and carried.

Clauses 1 to 65 were added to the Bill.

PREAMBLE AND TITLE.

The question whether the preamble and the title stand part of the Bill was put and carried.

The preamble and the title were added to the Bill.

THIRD READING OF THE TRAVANCORE SALE OF GOODS BILL.

MR. PUTHUPALLI S. KRISHNA PILLAI: I beg to move that the Bill be passed.

MR. C. V. CHANDRASEKHARAN: I second it.

The question whether the Bill be passed was put and carried.

THE TRAVANCORE PARTNERSHIP BILL.

MR. PUTHUPALLI S. KRISHNA PALLI: Sir, I beg to present the report of the Select Committee on the Travancore Partnership Bill and move that the Bill as revised be taken into consideration.

MR. C. V. CHANDRASEKHARAN: I second it.

The question whether the Bill be taken into consideration was put and carried.

The question whether clauses 1 to 72 and the Schedule form part of the Bill was put and carried.

Clauses 1 to 72 and the Schedule were added to the Bill.

PREAMBLE AND TITLE.

The question whether the preamble and title stand part of the Bill was put and carried.

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